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In the
Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 116

JOSEPH E. LIFSCHUTZ, M.D.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF SAN MATEO,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

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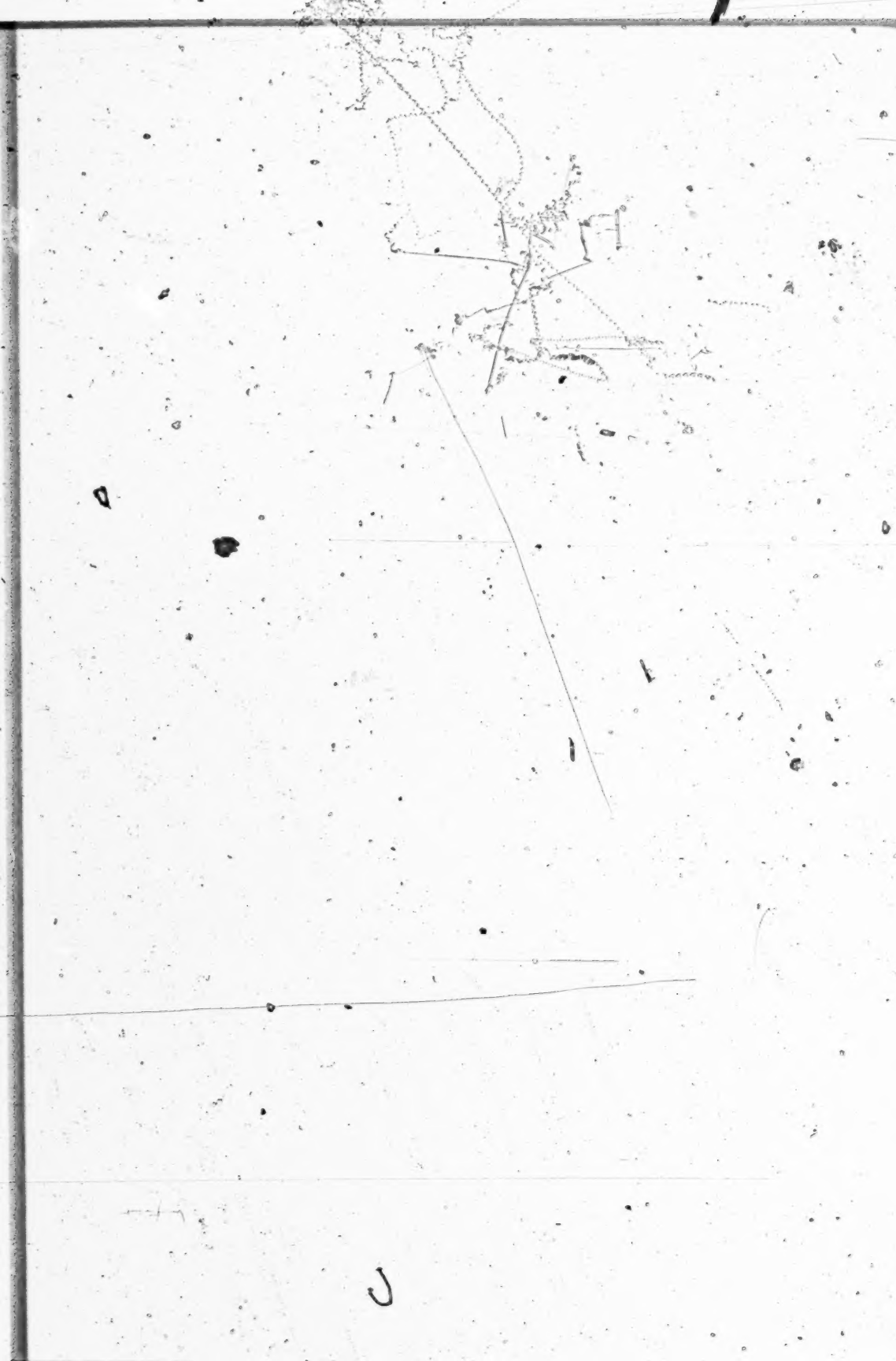

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No. .....

JOSEPH E. LIFSCHUTZ, M.D.,
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SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF SAN MATEO,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above action on March 5, 1969.

OPINIONS BELOW

Neither the Court of Appeal of the State of California, First Appellate District, Division Four, which initially denied petitioner's prayer for relief, nor the Supreme Court of California, which denied petitioner's Petition for a hearing after said denial, delivered any opinion. The orders denying relief are reproduced as Appendix C hereto.

JURISDICTION

The judgment of the Supreme Court of the State of California herein (Order Denying a Hearing) was made and

entered on March 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

This proceeding raises the question whether the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution protect petitioner, a physician and psychotherapist, and his patients as a class, from the state-compelled breach of both the physician's and the psychotherapist's pledge of total confidentiality for private disclosures made by all patients to the physician or therapist as an integral component of treatment, where the State would require disclosure under compulsion of a court order duly issued pursuant to California discovery procedure and enforceable by criminal contempt sanctions, and where the Constitutional privileges are claimed on a record which does not contradict petitioner's contentions that (i) total confidentiality of all such treatment disclosures is indispensable to the proper rendering of psychotherapeutic treatment by petitioner to each patient and to all of his patients as a class, and (ii) alternative discovery procedures already existing under California law fully protect the necessity to disclose material facts during litigation without invading and destroying the treatment relationship in the process.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent portions of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States; California Code of Civil Procedure §§ 1068, 1094, 1102-05, 1107-08, 1209, 1218-19, 1222, 2016, 2032, 2034; California Evidence Code §§ 992-96, 1012-16; California Penal Code § 1473; and California Rules of Court Rules 24(a), 56(a) are set forth in Appendix A hereto.

STATEMENT

This petition seeks review of an action commenced as an original proceeding in the appellate court of first instance of the State of California, the Court of Appeal of the State of California in and for the First Appellate District.

In that Court, on January 16, 1969, pursuant to CALIFORNIA CODE OF CIVIL PROCEDURE §§ 1102-05, petitioner filed a petition for a writ of prohibition against the Superior Court of the State of California in and for the County of San Mateo, asking the Court of Appeal to prohibit threatened action of the respondent Superior Court in excess of its jurisdiction.[1] CALIFORNIA CODE OF CIVIL PROCEDURE § 1102.

On February 5, 1969, the Court of Appeal, Division Four, denied the petition for a writ of prohibition without opinion, and petitioner then timely petitioned the Supreme Court of California for a hearing of the cause. That petition was denied March 5, 1969, Justice Mosk being of the opinion that a hearing should be granted. Upon denial of the hearing, the decision of the Court of Appeal denying a writ of prohibition became final. CALIFORNIA RULES OF COURT Rule 24(a). Thereby, and except for this review, petitioner exhausted his State remedies in this cause.

The petition for a writ of prohibition alleged that petitioner is a physician who for many years has specialized in the practice of psychiatry in California. Petitioner had been served with a subpoena duces tecum during the dis-

1. The first pleading in the action presented for review was the Petition for Writ of Prohibition in the Court of Appeal of California. That Petition raised all the federal Constitutional questions asserted here. In accordance with Rule 23 (1)(f) of the Rules of this Court, that Petition is reproduced as Appendix B hereto.

covery process in an action pending in the respondent Superior Court between one Housek and parties named Arabian ("real parties in interest" pursuant to California practice, CALIFORNIA RULES OF COURT Rule 56(a)). Housek had alleged in his complaint against the Arabians that, as the result of an assault and battery by John Arabian, he suffered among other things, "severe mental and emotional distress". The Arabians had discovered from Housek that many years prior to the incident he had received psychiatric treatment from petitioner Dr. Lifschutz, and sought by appropriate California discovery process to obtain petitioner's records and testimony concerning such treatment. Such records and testimony would be material to the Housek-Arabian suit since Housek had by his pleadings put his medical and "emotional condition [in] issue". CALIFORNIA CODE OF CIVIL PROCEDURE § 2016(b); CALIFORNIA EVIDENCE CODE §§ 996(a), 1016(a).

The California Evidence Code recognizes a physician-patient privilege (Sections 992-96) and a psychotherapist-patient privilege (Sections 1012-16), which for purposes of the present case operate in parallel, petitioner being a physician practicing psychotherapy, and can thus be considered together. Both articles of the statute recognize the testimonial privilege (Sections 994, 1014) and require the physician or therapist to claim it (Sections 995, 1015). However, in each statute the privilege is that of the patient (Sections 993, 1013) and is deemed automatically waived if the holder of the privilege has tendered an issue in litigation involving the privileged area.[2]

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2. Section 996(a): "There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by: (a) the patient, * * *".

Section 1016(a); "There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by: (a) the patient, * * *".

The alleged patient, Housek, has taken no position as to efforts by petitioner to keep the fact and content of any treatment he might have given Housek totally confidential; but petitioner asserted that Sections 996(a)[3] and 1016(a) of the California Evidence Code were unconstitutional in that they violated *his* privileges as a physician under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, and the correlative privileges of all of his patients as a class.[3] The nature of these Constitutional privileges will be more fully considered *infra.*

Raising these Constitutional claims at the outset, petitioner refused to produce his records and to answer questions concerning Housek during discovery in the Housek-Arabian suit. The Arabians cited him to appear before the respondent Superior Court where petitioner again raised his Constitutional claims. The Superior Court, without affording petitioner the evidentiary hearing he requested, overruled these claims and ordered him to answer and produce his records. CALIFORNIA CODE OF CIVIL PROCEDURE § 2034(a). Still standing on his Constitutional claims, petitioner again refused, and consequently in the respondent Superior Court has been cited to appear for further disposition of the matter in the light of his continued refusal. (*See* Exhibit K to Petition for Writ of Prohibition, Appendix B, *infra.*) Since the matter arose in that court by virtue of the Arabians' motion for sanctions, including criminal contempt, against petitioner and since the Superior Court had ordered a further report on the matter (*ibid.*), petitioner at this point stood in danger of a criminal convic-

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3. *See Barrows v. Jackson*, 346 U.S. 249, 257 (1953), for petitioner's right to assert the Constitutional privileges of all his patients, since "it would be . . . impossible for [this class] whose rights are asserted to present their grievance before any court."

tion for his assertion of First Amendment and other important rights under the United States Constitution. CALIFORNIA CODE OF CIVIL PROCEDURE § 2034(b)(1).

Having no further recourse in the Respondent Superior Court, petitioner then commenced the instant prohibition proceeding.

California contempt proceedings are criminal and summary. *Nieri v. Nieri,* 124 Cal. App. 2d 292 (1954); *In re Shackleford,* 116 Cal. App. 2d 864 (1953), even where they arise out of an order made in a civil action, *Darden v. Superior Court,* 235 Cal. App. 2d 80, 82 (1965). The pertinent California law of contempt is as follows:

"Disobedience of any lawful judgment, order, or process of the court" is a contempt, CALIFORNIA CODE OF CIVIL PROCEDURE § 1209(5), and may be punished by fine or imprisonment or both, CALIFORNIA CODE OF CIVIL PROCEDURE § 1218. Moreover, upon Dr. Lifschutz's continuing refusal to answer, he could be imprisoned indefinitely. CALIFORNIA CODE OF CIVIL PROCEDURE § 1219. Contempt orders are final and conclusive for all purposes when made. CALIFORNIA CODE OF CIVIL PROCEDURE § 1222. Appeals from contempt orders cannot lie. *Gale v. Tuolumne County Water Co.,* 169 C. 46, 50 (1916). The only possible review of a California contempt adjudication is by writs of certiorari and habeas corpus; but a writ of certiorari is one of grace and not of right, CALIFORNIA CODE OF CIVIL PROCEDURE § 1068; and habeas corpus, of course, presupposes that the petitioner is already "imprisoned or restrained of his liberty". CALIFORNIA PENAL CODE § 1473.

Thus petitioner sought a writ of prohibition only when he was immediately confronted with the certainty of a criminal conviction by the Superior Court (which had already overruled his claims without the evidentiary hearing petitioner had requested) for the assertion of legitimate Con-

stitutional rights which are entitled to the highest rank and consideration. Such threatened action would be in excess of the respondent Superior Court's jurisdiction, since there cannot be a valid contempt adjudication for the orderly assertion of Constitutionally protected rights. *Fortenbury v. Superior Court,* 16 C. 2d 405 (1940). In situations of this character, California has classically afforded relief by issuing writs of prohibition in independent proceedings such as this, on the theory that the base-line court lacked jurisdiction to render decisions, such as the one complained of, which resulted in the violation of Constitutional rights, *Harden v. Superior Court,* 44 C. 2d 630 (1955); *Rescue Army v. Municipal Court,* 28 C. 2d 460 (1946), *appeal dismissed,* 331 U.S. 549 (1947); *Abelleira v. District Court of Appeal,* 17 C. 2d 280 (1941); *Fortenbury, supra*—and rightly so, since this Court's Constitutional mandate requires that one may not be confronted with the imposition of a fine and of potentially indefinite imprisonment for defending basic medical principles on established Constitutional grounds against an overbroad law. *See Zwickler v. Koota,* 389 U.S. 241 (1967).

The petition for a writ of prohibition was filed in the court below after it became clear that petitioner would receive no relief in the United States District Court for the Northern District of California in an action he had filed therein against the real parties in interest and against the present respondent court through the person of its presiding judge, Hon. Frank W. Rose, in which petitioner had sought a declaration of his rights and an injunction against the contempt and additional sanction proceedings. The United States District Court action was in fact dismissed shortly thereafter by a single judge without following the procedure for convening a three-judge district court; and the propriety of that dismissal is presently pend-

ing in this Court for review in *Lifschutz v. Arabian,* Misc. No. 1843, a companion case. When it became apparent that despite *Zwickler v. Koota, supra,* and similar cases, the district court would not afford petitioner a hearing and consideration of his claims, he filed the present proceeding as a means of having his Constitutional claims heard. This writ proceeding is now final in the California judicial system, and the denial of relief to petitioner constitutes a complete adjudication of the merits of his claim. *Bandini Petroleum Co. v. Superior Court,* 284 U.S. 8 (1931). Accordingly, the matter is presented by way of this petition for a review on the merits by this Court.

REASONS FOR GRANTING THE WRIT

I. Sections 996(a) and 1016(a) of the California Evidence Code, in Their Application Here, Are Overbroad and Violate the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

The decision below must be reviewed because it upholds the intrusion by a State statute into an area of speech entitled to the highest degree of Constitutional protection. Absent issuance by the California courts of an alternative writ of prohibition, the allegations of the petition for that writ are accepted as true, *Goldman v. Superior Court,* 124 Cal. App. 2d 165 (1954); CALIFORNIA CODE OF CIVIL PROCEDURE § 1094, and should therefore be regarded as true upon review in this Court, *Gardner v. Toilet Goods Association,* 387 U.S. 167 (1967); *United States v. New Wrinkle, Inc.,* 342 U.S. 371 (1952). These allegations state that proper medical practice requires for effective psychotherapeutic treatment (1) a bond of utter confidentiality between the treating psychotherapist and his patient not only as to the contents but even as to the fact of such treatment, and (2) a guarantee that this confidentiality will not be invaded

by anyone—even by the State under the color of law. The medical and psychotherapeutic privilege statutes of the State of California may be progressive and well-intentioned,[4] but these statutes interfere with the foregoing treatment necessities because the statutes fail to recognize that communications made in the course of psychotherapeutic treatment have a special content which particularly entitle them to total privacy under Constitutional protection. Such communications differ from other privileged communication between doctor and patient in that such speech *is* itself the treatment in psychotherapy. Neverthe-

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4. The need for total confidentiality was well-perceived by the California Law Revision Commission when it developed the precise Evidence Code provisions on medical and psychotherapeutic privilege which are challenged here. The Legislative Committee comment to California Evidence Code § 1014 (Assembly J., April 6, 1965) thus quotes the Commission:

> "A broad privilege should apply to both psychiatrists and certified psychologists. Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Research on mental or emotional problems requires similar disclosure. Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends.
>
> "The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article establishes a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. *Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.* [Emphasis supplied.]"

This case demonstrates that the legislative solution to the problem was inadequate to meet the Legislature's own expressed aims. The question thus reaches its Constitutional dimension.

less, the patient and his physician are stripped of this protection if the patient does any one of a number of things essentially unrelated to treatment, such as (in the present case) putting his medical or emotional condition in issue through litigation. Thus, no one could seek or give proper psychotherapeutic treatment in California without risking the opening to public view of the unconscious configurations of the patient's mind which such treatment exposes if—as here—years later the patient were to seek redress for a personal injury, arising long after treatment had ceased.

Petitioner has asserted, and contends that it is proper medical and phychotherapeutic practice, that in psychiatric medicine "total confidentiality in the psychotherapeutic relationship is an essential prerequisite to both the physician's capacity to carry on such practice and to each past, present and future patient's medical treatment. * * * The underlying principles of psychotherapy and of psychoanalysis absolutely require, as a prerequisite to meaningful treatment, that the patient say everything that comes to his mind, stripping away both the conscious blocks and defenses of which the patient may be aware and the subconscious or unconscious blocks or defenses of which the patient may not be aware; and in that connection there must be explicit assurance that all communications * * * are and will forever remain fully confidential."[5] These statements are uncontested in the record.

Petitioner has further asserted[6] without contradiction that "[f]or the foregoing reasons, it would destroy [his]

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5. The foregoing quotation is from petitioner's affidavit in his United States District Court petition, which was incorporated in the present record as Exhibit F to his petition for a writ of prohibition.

6. *Ibid.*

ability to give psychiatric treatment to *all* of his patients if he were required under compulsion of law to reveal either the fact that any given individual was or is his patient, or the contents, in whole or in part, of the physician-patient relationship * * * with *any* of his patients." [Emphasis in original.]

The statutes which invade this particularly privileged relationship are especially overbroad since the policy which they pursue—full disclosure of material facts in litigation—can be secured by the readily available alternative of a diagnostic examination by a physician other than the treating one.[7] Such diagnostic exploration will reveal the patient's pathology with substantial accuracy, without demolishing the very processes of confidentiality *necessary* for the doctor-patient relationship to result in successful treatment, and in improvement and relief for the patient's condition. The State of California has provided for a procedure by which such medical examination can be compelled. *See* CALIFORNIA CODE OF CIVIL PROCEDURE § 2032; *cf. Schlagenhauf v. Holder*, 379 U.S. 104 (1964).

In this context, *Smith v. People of California*, 361 U.S. 147, 150-51 (1959), assumes particular meaning:

> "Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it. *The States generally may regulate the allocation of the burden of proof in their courts, * * * but where we conceived that this device was being applied in a manner tending to cause even a self-imposed restriction of free expression, we struck down its application.* It has been stated here that the usual

7. *Ibid.*

doctrines as to the separability of constitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. *Thornhill v. Alabama,* 310 U.S. 88, 97-98 * * *. And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; *a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.*" [Emphasis supplied.]

In his petition for a hearing in the California Supreme Court, Dr. Lifschutz emphasized some of the medical necessities which the Constitutional provisions here invoked should protect from intrusion by the statutory waiver procedures:

—that a specific therapeutic procedure consisting specifically of confidential communication is at the core of the psychotherapeutic process, and that this communication cannot freely take place unless absolute confidentiality is assured by the physician on his own initiative to all patients;

—that unless each patient is assured that total confidentiality is given, no patient will—in the long, bitter and painful process of psychotherapy, and particularly psychoanalysis—be completely free in his "free association" verbal production, disclosing to the physician all of his thoughts, actions, fears, feelings and fantasies;

—that absent such total free association, the physician cannot reach the patient's unconscious mind, the contents of which are not known to the patient himself at the commencement of treatment;

—that if the law prevents his giving a total assurance of secrecy and thus prevents the patient from having

a free association therapy which is truly free, the physician is deprived both of the ability and the right to practice psychotherapy according to the ordinary tenets of his profession and cannot fulfill his medical function;

—that *total* confidentiality is of the essence because in exploring the unconscious, the patient does not know at the outset of the treatment process what are the fears and fantasies which he will in due course reveal as treatment progresses, and thus he *cannot commence* treatment unless absolute privacy is assured in advance;

—that if any impediment is placed in the way of unreservedly open and confidential discourse between doctor and patient, the neurotic component of the patient's personality will actively use that impediment to block any cure;

—that any legal process which would force the physician to break his oath of total secrecy, to be maintained for psychotherapeutic treatment at all costs, has in itself an impact upon the *physician's* capacity to practice psychotherapy, through the phenomenon known as countertransference in which the doctor's own mental health (his chief treatment tool in the psychotherapeutic process) is adversely affected by his having, under legal compulsion, broken the basic oath of confidentiality he gave to all of his patients;

—that all patients as a class will be injured and the treatment of all patients as a class will be interfered with if their psychiatrist is forced to divulge a confidence in any one case which he has given his professional oath to maintain at all costs;

—that these principles are of universal application in psychotherapy, of the very first importance, and not idiosyncratic to the petitioner.

Four years ago this Court held in the landmark decision of *Griswold v. Connecticut,* 381 U.S. 479 (1965) that the

First, Ninth and Fourteenth Amendments to the United States Constitution protect a physician in the exercise of his skills against statutes which on their face inhibit the physician's activities in giving medical assistance to his patients, as a class, according to ordinary methods of treatment prevalent in the art. Since petitioner has raised the basic question presented by this litigation, no one has come forward to say that the principle which he asserts, that of total secrecy even of the existence, and certainly of the contents, of the psychiatric treatment relationship, represents anything other than a fundamental premise homologously applied by the psychotherapeutic professions as a matter of necessity in their quest to relieve emotional illness.

Griswold is the pillar upon which the present case is built. *Griswold* clearly affords full Constitutional protection under the First, Ninth and Fourteenth Amendments, and under a penumbra emanating from the Constitution as a whole, for ordinary treatment processes in psychotherapy.

This record shows that the California statutes under review greatly hamper and possibly prevent successful psychotherapy according to prevalent medical standards. This is not due to indifference of the State of California; indeed, its legislature was aware at the very moment of enacting the statutes under attack of the great need for total confidentiality in the psychotherapeutic process as a condition for its effective functioning. *See* the Legislative Committee's comment to California Evidence Code §1014 (Assembly J., April 6, 1965), *n.* 4, *supra.* It is simply that, recognizing the total medical need for confidentiality and attempting to balance this need against the social objective of full disclosure of facts in litigation (an objective which petitioner has recognized from the outset of the present proceeding), the legislature ultimately drew a line which, however well-intentioned, nonetheless would force every psychotherapist

to compromise the essential principles here asserted. Such a compromise is not only a compromise of principle for the therapist, which in itself might invade Constitutionally protected freedoms; it goes further and actively interferes with proper medical treatment. That compromise is particularly unnecessary since, to repeat, all required information in the context of full disclosure in litigation can be revealed through diagnostic interviews by a non-treating physician. A statute which thus seeks to compromise social objectives by invading Constitutionally privileged areas must fall for overbreadth. *Ashton v. Kentucky,* 384 U.S. 195, 200-01 (1966); *Shuttlesworth v. City of Birmingham,* 382 U.S. 87, 93-95 (1965); *Baggett v. Bullitt,* 377 U.S. 360, 373-74 (1964); *N.A.A.C.P. v. Button,* 371 U.S. 415, 416, 432-38 (1963).

It bears emphasis that petitioner seeks protection not for psychiatrists as a class, nor for all doctor-patient communications made in the course of treatment. Petitioner is not asking whether the Constitution must or should extend that far. But the juxtaposition of doctor-patient communication *in the context of the treatment procedures of psychotherapy* assumes unique dimensions, since the full verbalized baring of his unconscious mind which has been hidden from the patient himself until the treatment progresses is itself the treatment. If the confidentiality principle is not upheld, effective treatment will have been prevented by the law.

Insofar as the statutes complained of fail to recognize that the physician has a privilege of his own and that his patients as a class must be protected from the inadvertent or neurotically-motivated destruction by one patient of the skein of confidentiality, breaching the guarantee which the psychotherapist must be able to give prospectively to all his patients no matter what the future may bring, these statutes seize "what [a person] seeks to preserve as private, even in an area accessible to the public", *Katz v. United States,*

389 U.S. 347 (1967). In so doing, these statutes violate the Fourth Amendment. Additionally, this Court has interpreted the Fifth Amendment as conferring upon each individual a "right * * * to a private enclave where he may lead a private life". *Tehan v. U.S. ex rel. Shott,* 382, U.S. 406, 416 (1966).

Petitioner herein prays this Court for no more. His life's meaning rests in providing a private place for patients to discern and ultimately to confront their own identities. This intimate and, under *Griswold, supra,* Constitutionally protected activity is invaded and gravely compromised by the statutes complained of, without justification.

II. Petitioner's Question Is Ripe for Adjudication in This Court.

These issues are now presented for review on their merits, since this Court has long recognized that California's extraordinary writ procedures constitute independent actions, which, when finally disposed of in the state judicial system, are independently subject to review in this Court upon their merits. *Bandini Petroleum Company v. Superior Court,* 284 U.S. 8 (1931)[8]. A limited number of exceptions to the *Bandini* rule which authorizes full review of such prohibition proceedings was developed in *Rescue Army v. Municipal Court,* 331 U.S. 549 (1947). These exceptions are not applicable to the present case. In this case, unlike *Rescue Army,* there is no possible construction of the State statute which might not conflict with the asserted Constitutional claim. Nor is there the possibility of any trial in which a fuller record might be developed, since at all levels of the state judicial system (the Superior Court, the Court of Appeal and the Supreme Court of California) petitioner's requests for evidentiary hearings were denied. It is apparent that the present record is as full as any

8. This Court has described the *Bandini* ruling as "well settled." *Rescue Army v. Municipal Court,* 331 U.S. 549, 556 (1947).

record which can be created to present the issue meaningfully for this Court's review, particularly in view of the United States District Court's refusal to grant petitioner an evidentiary three-judge hearing. (*See* Petition for Writ of Mandamus in *Lifschutz v. Arabian,* Misc. No. 1843, October, 1968 Term.)

CONCLUSION

For the foregoing reasons, it is apparent that the Supreme Court and Court of Appeal of California have decided a federal question of substance never determined by this Court, and have decided it in a way not in accord with applicable decisions of this Court. Thus the case meets both —not either— conditions of Rule 19 (1)(a) of the Rules of this Court; and it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

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Appendix A

Relevant Constitutional Provisions and Statutes.

United States Constitution

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws. * * *

Title 28, United States Code

§ 1257. State Courts; Appeal; Certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

California Code of Civil Procedure

§ 1068. Power to Grant—Municipal Courts.—A writ of review may be granted by any court, except a municipal or justice court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.

§ 1094. Hearing on the Record in Absence of Issue Joined.—If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial right of the parties, the court must proceed to hear or fix a day for hearing the argument of the case.

§ 1102. Nature and Effect of Writ.—The writ of prohibition arrests the proceedings of any tribunal, corporation

board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person.

§ 1103. Power to Issue—Municipal Court.—It may be issued by any court, except municipal or justice courts, to an inferior tribunal or to a corporation board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon the verified petition of the person beneficially interested.

§ 1104. Alternative or Peremptory—Form and Contents.—The writ must be either alternative or peremptory. The alternative writ must command the party to whom it is directed to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court at a time and place then or thereafter specified by court order why such party should not be absolutely restrained from any further proceedings in such action or matter. The preremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained must be omitted.

§ 1105. Governed by Rules Governing Mandamus.—The provisions of the preceding chapter, except of [*sic*] the first four sections thereof, apply to this proceeding.

§ 1107. Service of Application.—When an application is filed for the issuance of any prerogative writ, the application shall be accompanied by proof of service of a copy thereof upon the respondent and the real party in interest named in such application. Where the real party in respondent's interest is a board or commission, such service shall be made upon the presiding officer, or upon the secretary, or upon a majority of the members, of such board or commission. Within five days after service and filing of the

application, the real party in interest or the respondent or both may serve upon the applicant and file with the court points and authorities in opposition to the granting of the writ.

The court in which the application is filed, in its discretion and for good cause, may grant the application ex parte, without notice or service of the application as herein provided.

The provisions of this section shall not be applicable to applications for the writ of habeas corpus, or to applications for writs of review of the Industrial Accident or Public Utilities Commissions.

§ 1108. Time of Return and Hearing.—Writs of review, mandate, and prohibition issued by the Supreme Court, a court of appeal, or a superior court, may, in the discretion of the court issuing a writ, be made returnable, and a hearing thereon be had at any time.

§ 1209. Acts and Omissions Constituting.—The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: * * *

5. Disobedience of any lawful judgment, order, or process of the court; * * *

§ 1218. Limit of Punishment.—Upon the answer and evidence taken, the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars ($500), or he may be imprisoned not exceeding five days, or both; provided, however, that in justice courts the judge may punish by fine or imprisonment or both, such fine not to exceed, in any case, one hundred dollars ($100), and such imprisonment one day; the conviction, specifying particularly the offense, and the judgment thereon, must be entered in the docket.

No party, who is in contempt of a court order or judgment in a divorce or separate maintenance action, shall be permitted to enforce such order or judgment, by way of execution or otherwise, either in the same action or by way of a separate action, against the other party. This restriction shall not affect nor apply to the enforcement of child support orders.

§ 1219. Compelling Performance by Imprisonment.—When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have [*sic*] performed it, and in that case the act must be specified in the warrant of commitment.

§ 1222. Finality of Order.—The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive.

§ 2016. Depositions in Pending Actions—Scope—Admissibility as Evidence. * * *

(b) Unless otherwise ordered by the court as provided by subdivision (b) or (d) of Section 2019 of this code, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this State with respect to

the existence of any privilege, whether provided for by statute or by judicial decision.

The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice, and any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances. * * *

§ 2032. Order for Examination by Physician.—(a) In an action in which the mental or physical condition or the blood relationship of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician or to produce for such examination his agent or the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

(b) (1) If requested by the party against whom an order is made under subdivision (a) of this section or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions, together with like reports of all earlier examinations of the same condition. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party or persons examined a like report of any examination, previously or thereafter made, of the same condition. If the party or person exam-

ined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party against whom an order is made under subdivision (a) of this section or the person examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same condition.

(3) Unless otherwise agreed, the provisions of subdivisions (b) (1) and (2) of this section shall be applicable in cases where an examination is made pursuant to stipulation.

(c) Service upon a party of any notice, motion or order made under this section may be made upon any party or his attorney in the manner provided in Chapter 5, Title 14, Part 2 (commencing at Section 1010) of this code.

§ 2034. Refusal of Deponent to Answer Questions or Interrogatories or to Obey Subpoenas or Orders.—(a) If a party or other deponent refuses to answer any question propounded upon examination during the taking of a deposition, or refuses to produce at a deposition any books, documents or other things under his control pursuant to a subpoena duces tecum, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Such proponent, on notice to all persons affected thereby, may move the court in which the action is pending (if the deponent is a party or otherwise subject to the jurisdiction of such court), or if such court does not have jurisdiction over the deponent, to the superior

court of the county in which the deposition is taken for an order compelling an answer or if good cause is shown, the production of such book, document, or other thing. Such motion may also be made, without further notice, if the proponent notifies the refusing party or other deponent at the time of such refusal that the proponent will apply to the court for an order pursuant to this subdivision of this section, at a specified time not less than 10 nor more than 30 days from the date of such refusal, in which event the officer before whom the deposition is taken shall direct the refusing party or other deponent to attend a session of said court at said time. Not less than five days prior to the hearing on any such motion, the proponent must lodge with the court the original transcript of such deposition. Upon the refusal of a party to answer any interrogatory submitted under Section 2030 of this code, the proponent of the question may on like notice make like application for such an order. Upon the refusal of a party to admit or deny the genuineness of any documents or the truth of any matters of fact, after having been served with a request under Section 2033 of this code, the party serving such request may on like notice make like application for an order requiring further answers to such request, or, in the alternative, for an order that the genuineness of said documents or the truth of said matters of fact be deemed admitted for the purpose of the action. If the motion is granted and if the court finds that the refusal was without substantial justification the court may require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial

justification, the court may require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion including reasonable attorney's fees.

(b)(1) The court may punish as a contempt (i) the refusal of any person to obey a subpoena issued by that court to attend a deposition or to be sworn as a witness, or (ii) the refusal of any person to attend a session of court (either personally or by his attorney) after having been directed to attend in the manner provided in subdivision (a) of this section, or (iii) the refusal of any person to obey any order made by the court under subdivision (a) of this section.

California Evidence Code

§ 992. Confidential Communication Between Patient and Physician Defined.—As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship.

§ 993. Holder of Privilege Defined.—As used in this article, "holder of the privilege" means:

(a) The patient when he has no guardian or conservator.

(b) A guardian or conservator of the patient when the patient has a guardian or conservator.

(c) The personal representative of the patient if the patient is dead.

§ 994. Who May Claim Privilege.—Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician if the privilege is claimed by:

(a) The holder of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the physician at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

The relationship of a physician and patient shall exist between a medical corporation as defined in Article 17 (commencing with Section 2500) of Chapter 5 of Division 2 of the Business and Professions Code and the patient to whom it renders professional services, as well as between such patients and licensed physicians and surgeons employed by such corporation to render services to such patients. The word "persons" as used in this subdivision includes partnerships, corporations, associations, and other groups and entities.

§ 995. When Physician Must Claim Privilege.—The physician who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communuication is sought

to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 994.

§ 996. Condition of Patient in Issue.—There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient if such issue has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

§ 1012. Confidential Communication Between Patient and Psychotherapist Defined.—As used in this article, "confidential communication between patient and psychotherapist" means information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or examination or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose of the consultation or examination, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.

§ 1013. Holder of Privilege Defined.—As used in this article, "holder of the privilege" means:

(a) The patient when he has no guardian or conservator.

(b) A guardian or conservator of the patient when the patient has a guardian or conservator.

(c) The personal representative of the patient if the patient is dead.

§ 1014. Who May Claim Privilege.—Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) The holders of the privilege;

(b) A person who is authorized to claim the privilege by the holder of the privilege; or

(c) The person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.

§ 1015. When Psychotherapist Must Claim Privilege.—The psychotherapist who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 1014.

§ 1016. Condition of Patient in Issue.—There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

(a) The patient;

(b) Any party claiming through or under the patient;

(c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) The plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

California Penal Code

§ 1473. Who May Prosecute Writ.—Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.

California Rules of Court

Rule 24. Decision of Reviewing Court

(a) When Decisions Become Final.—All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30-day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification. * * *

Rule 56. ORIGINAL PROCEEDINGS

(a) Form and Content of Petition.—A petition to a reviewing court for a writ of mandate, certiorari, or prohibition, or for any other writ within its original jurisdiction, must be verified and shall set forth the matters required by law to support the petition, and also the following: (1) If the petition might lawfully have been made to a lower court in the first instance, it shall set forth the circumstances which, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court; and (2) if any judge, court, board, or other officer or tribunal in the discharge of duties of a public character be named therein as a respondent, the petition shall disclose the name of the real party in interest, if any, or the party whose interest would be directly affected by the proceeding. * * *

Appendix B

Petition for Writ of Prohibition in the Court of Appeal of the State of California

In the Court of Appeal State of California

1 Civil No. 26461

First Appellate District

Joseph E. Lifschutz, M. D.,
Petitioner,

vs.

Superior Court of the State of California in and for the County of San Mateo,
Respondent,

John Arabian, George J. Arabian, and Isabelle H. Arabian,
Real Parties in Interest.

PETITION FOR WRIT OF PROHIBITION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SAID PETITION

To the Honorable Court of Appeal of the State of California, First Appellate District:

Your petitioner, Joseph E. Lifschutz, M. D., respectfully applies for a writ of prohibition by this, his verified petition, and in support thereof alleges:

I

On or about June 3, 1968, one Joseph F. Housek filed in the respondent court his Civil Action against real parties in interest, under File No. 137757, wherein Housek seeks

damages for his "severe mental and emotional distress" allegedly caused by John Arabian, one of the real parties in interest; and the answer filed in said action by real parties in interest alleges "that plaintiff [Housek] violently and viciously committeed an assualt and battery upon defendant, John Arabian," and further, that certain violent acts of which John Arabian is accused therein "were caused and provoked by the plaintiff [Housek]". True copies of the complaint and answer in the Housek suit are attached hereto as Exhibits A and B respectively and incorporated herein by this reference.

II

Petitioner is, and at all pertinent times was, a physician licensed to practice as such in the State of California, conducting an active practice of medicine within this state and specializing in the practice of psychiatry.

Petitioner further has for many years last past specialized in the practice of psychoanalysis, which is a recognized subspecialty or subdiscipline within the medical specialty of psychiatry.

III

On or about October 17, 1968, petitioner was duly and properly served with a subpoena duces tecum obtained by real parties in interest from the respondent court, ordering petitioner to appear at the offices of the attorneys for real parties in interest on October 24, 1968. True copies of said subpoena duces tecum and documents attached thereto are attached hereto as Exhibit C and incorporated herein by this reference.

IV

Pursuant to said subpoena, petitioner appeared at the offices of the attorneys for real parties in interest and was examined by them under oath.

In the course of said examination, said attorneys propounded to petitioner the following questions which petitioner respectfully declined to answer:

"Q. Did you ever treat Mr. Joseph Housek?

"A. I do refuse to answer that question on the advice of my attorney.

"Q. And I take it that any other question I ask you concerning Joseph F. Housek you will also refuse to answer, is that correct?

"A. That is correct."

Petitioner at the taking of the deposition based his refusal to answer said questions upon his Constitutional privilege not to answer, pursuant to the First and Fifth Amendments to the Constitution of the United States. Petitioner has since broadened said claim so as to base his right not to answer upon the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States and Articles I, Sections 9, 13, 19 and 23 of the Constitution of the State of California.

A transcript of the proceedings at the taking of petitioner's deposition is attached hereto as Exhibit D and incorporated herein by this reference.

V

At the taking of said deposition, petitioner was directed and instructed, in accordance with law, to appear before the respondent court, at a certain time at which, pursuant to notice, real parties in interest asked the respondent court to find petitioner in contempt for violating a court order.

VI

Real parties in interest are asserting their rights to act in this matter, and the wrongfulness of petitioner's refusal as aforesaid, upon the provisions of Sections 996(a) and 1016(a) of the Evidence Code of the State of California, which on their face support the position of real parties in interest. As so applied, said statutory provisions are in violation of the Constitutions of the United States and the State of California as stated above, for the reasons stated below.

VII

In the psychiatric branch of medicine, and particularly in the psychoanalytic subbranch thereof, total confidentiality in the psychotherapeutic relationship is an essential prerequisite to both the physician's capacity to carry on such practice and to each past, present and future patient's medical treatment. This principle is so absolute that even the revelation whether or not a given individual is or has been a patient of a particular physician will conflict with it. The underlying principles of psychotherapy and of psychoanalysis absolutely require, as a prerequisite to meaningful treatment, that the patient say everything that comes to his mind, stripping away both the conscious blocks and defenses of which the patient may be aware and the subconsious or unconsious blocks or defenses of which the patient may not be aware; and in that connection there must be explicit assurance that all communications (including the existence of the physician-patient relationship) are and will forever remain fully confidential.

VIII

For the foregoing reasons, it would destroy petitioner's ability to give psychiatric treatment to *all* of his patients

if he were required under compulsion of law to reveal either the fact that any given individual was or is his patient, or the contents, in whole or in part, of the physician-patient relationship (or of the psychotherapist-patient relationship, each being encompassed within the other) with *any* of his patients.

IX

The aforesaid provisions of the Constitutions of the United States and of the State of California afford petitioner a Constitutional privilege to pursue the lawful practice of his profession without being required to respond to the questions propounded to him by real parties in interest, or to any questions inquiring into the existence, nature or contents of the petitioner's professional relationship with his patients, or to reveal his patient files, such disclosures being contrary to and in derogation of the rules of petitioner's profession; and said provisions of the Constitutions of the United States and the State of California further afford each and all of petitioner's patients an absolute privilege to seek and receive medical and psychotherapeutic treatment from petitioner in the assurance that petitioner shall not be required to divulge the fact or the contents thereof under compulsion of law to any person at any time. Petitioner further has standing to assert the Constitutional privileges of his patients in this regard.

X

Upon being cited by real parties in interest to appear before the respondent court to show cause if any he had, why he should not be held in contempt of said court for refusing to produce his records and to answer real parties' questions on the grounds of his claimed Constitutional privilege, petitioner brought an action in the United States

District Court for the Northern District of California, No. 50233, against real parties in interest and against the Hon. Frank W. Rose in his capacity as Presiding Judge of the respondent court, "for declaratory relief and for a temporary restraining order, preliminary and permanent injunction, and petition to constitute three-judge district court," praying that petitioner's claims under the United States Constitution, as hereinabove alleged, be upheld and that respondent court and real parties in interest be restrained from taking any action to hold him in contempt of the respondent court.

Proceedings were had thereon in the United States District Court on November 1, 1968.

Because of the length and complexity of the documents filed therein and of the legal issues presented, true copies thereof are attached hereto instead of reiteration here, and incorporated herein by this reference as follows:

Exhibit E Complaint
Exhibit F Affidavit of Joseph E. Lifschutz, M. D.
Exhibit G Memorandum of Plaintiff in Support of Petition [etc.]
Exhibit H Reporter's Transcript of Proceedings in the United States District Court November 1, 1968.

After the conclusion of the Federal Court proceedings on November 1, 1968, real parties in interest advised petitioner and the United States District Court that they would proceed in the respondent court to assert their alleged rights in the matter, and petitioner requested the United States District Court for a temporary restraining order and further relief. No ruling has ever been made of record in the United States District Court on said request.

Thereafter and in due course real parties' motion for sanctions against petitioner, etc., came on for hearing

before the respondent court. Petitioner filed a memorandum in support of his position in said court, true copy of which is attached as Exhibit I. A copy of the full transcript of proceedings in the respondent court upon that occasion (the only proceedings ever had in respondent court on this matter) is attached hereto as Exhibit J.

Thereafter the respondent court made its order requiring petitioner to answer the questions of real parties in interest and to produce the documents demanded by real parties in interest, thus *sub silentio* effectively denying both the petitioner's Constitutional claims and petitioner's request that he be permitted to adduce evidence in the respondent court concerning the seriousness, importance and gravity of the Constitutional questions which he had raised. A true copy of the order of respondent court dated December 20, 1968, is attached hereto as Exhibit K.

XII

Petitioner, under compulsion of conscience and good medical ethics, considers himself duty bound to protect the absolute confidentiality of the communications of all of his patients and ex-patients to him, and to persevere in asserting the Constitutional privilege under the United States and California Constitutions, not to comply with the discovery procedures resulting from Housek's conditional waiver of privilege contained in Sections 996(a) and 1016(a) of the California Evidence Code. Said sections are unconstitutional on their face, for the reasons stated herein.

Respondent court now immediately and urgently threatens to hold petitioner in contempt of said court, at a hearing presently scheduled for January 20, 1969, pursuant to order of respondent court (Exhibit K); and real parties in interest propose then to request respondent court so to

hold petitioner in contempt, based solely upon the assertion and exercise of petitioner's aforesaid Constitutional privilege against such disclosures; and such contempt proceedings will be final when made, not subject to appeal, will be had without any hearing at which evidence can be taken, and will have a "chilling effect" upon the exercise of petitioner's Constitutional rights of freedom of speech under the First Amendment to the United States Constitution and correlative provisions of the California Constitution.

XIII

All of such actions are instantly and immediately threatened against petitioner on January 20, 1969, and petitioner has no plain, speedy or adequate remedy in the ordinary course of law and will sustain irrevocable injury if such proceedings are permitted to occur. Contempt proceedings are criminal in character and are not appealable as of right, with the consequence that if petitioner persists in his conscientious efforts to pursue the practice of medicine according to the best tenets of his specialty, he will be instantly exposed to criminal sanctions in the respondent court unless this Court prohibits any further proceedings either to require petitioner so to answer and disclose his records or to punish him for a refusal to do so, and unless this Court grants relief by its appropriate writ.

XIV

Therefore, petitioner prays that an alternative and final writ of prohibition issue, restraining, enjoining and prohibiting respondent Superior Court and real parties in interest from any further proceedings to require petitioner to answer or produce his medical records in the respondent

court, concerning one Joseph F. Housek, or to suffer any sanction, penalty or contempt for his failure to do so.

Dated: January 15, 1969.

SEVERSON, WERSON, BERKE & BULL

By /s/ KURT W. MELCHIOR,

Attorneys for Petitioner

[Verification omitted.]

Exhibit K

THIS IS A MEMORANDUM DECISION AND DOES NOT CONSTITUTE A JUDGMENT

Hon. James T. O'Keefe, Judge of the Superior Court, Redwood City, California, December 20, 1968.

Office of the County Clerk
San Mateo County

No. 137757 Joseph S. [*sic*] Housek v. John Arabian, et al.

On the Motion for sanctions and for attorneys' fees heretofore submitted in the above entitled action, the Court has this day rendered the following decision:

"The witness, Joseph E. Lifschutz, is hereby ordered to answer the questions involved in the taking of his deposition and to comply with the production requirements of the subpoena dues tecum issued in this proceeding (the declaration therefor being filed herein on October 11, 1968)

The matter will be continued for 30 days during which time said Joseph E. Lifschutz will comply with this order at a time during said period agreed upon by the parties, or on proper notice in the absence of agreement.

Motion for sanctions and attorney's fees denied."

JOHN A. BRUNING, County Clerk

By MURA B. STILLESON
Deputy Clerk

Copies mailed to:
Severson, Werson, Berke & Bull
433 California St., SF 94104
Cesari & Werner,
150 Post St., S.F. 94108

[*Exhibits omitted with the exception of Exhibit K*]

Appendix C

Orders Denying Relief

Court of Appeal of the State of California

in and for the

FIRST APPELLATE DISTRICT

Division Four

Filed, Feb. 5, 1969.

No. 26461

Joseph E. Lifschutz, M.D.,
Petitioner,

vs.

Superior Court, County of San Mateo,
Respondent,

John Arabian, et al.,
Real Parties in Interest.

By the Court:
The petition for a writ of prohibition is denied.
Dated Feb. 5, 1969.

DEVINE, P. J.

Clerk's Office, Supreme Court
4250 State Building

San Francisco, California 94102
March 5, 1969

Dear Sir: I have this day filed Order .....

HEARING DENIED

In re: 1 Civ. No. 26461

Lifschutz vs. Superior Court, San Mateo Co.

Respectfully,

WILLIAM I. SULLIVAN
Clerk

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 4 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 116

JOSEPH E. LIFSCHUTZ, M. D.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN MATEO, Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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MOTION OF THE AMERICAN PSYCHIATRIC ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Psychiatric Association moves this Honorable Court for leave to file a Brief in this case as Amicus Curiae. The consent of the attorney for the Petitioner herein has been obtained but the attorneys for the Respondents herein refuse to consent to the filing of a Brief by the American Psychiatric Association as Amicus Curiae. The

applicant, American Psychiatric Association, has an interest in this case in that the questions involved concern the conduct of the practice of the profession of psychiatry nationwide and affect the practice of psychiatry by the more than seventeen thousand qualified Doctors of Medicine who are members of the American Psychiatric Association and who specialize as Psychiatrists in the diagnoses, treatment and care of mental illnesses. The petition and the pleadings filed by Petitioner herein and in the court below argue the appropriateness and the legality of the Judgment of the Supreme Court of California entered in the proceedings below on March 5, 1969, in that court. That Judgment denied Petitioner's request for a writ of prohibition directed to the respondent court. Petitioner's demands for hearings concerning the constitutionality of the California statute involved were denied without opinions.

The orders below require Petitioner, a Psychiatrist, to reveal intimate personal confidences involved in the treatment of an emotionally disturbed patient, under the automatic waiver provisions of the California evidentiary statute in a civil action for injuries filed by the patient. Under the statute the filing by the patient of the civil action, without more, automatically terminates the privilege. Petitioner under pain of contempt will be forced to breach the confidence contrary to his professional ethics and his Hippocratic oath as a physician. Psychiatry as a whole views with alarm such automatic compulsory breach of the personal confidence privilege underlying psychiatric treatment which disregards the interests of society. Society will be better served if psychiatrists are able to assure their patients that their confidences are inviolate.

CONCISE STATEMENT OF THE NATURE OF APPLICANT'S INTEREST

The American Psychiatric Association, founded in 1844, is a national membership organization of Doctors of Medicine, i.e. Psychiatrists, who specialize in the diagnoses, treatment and care of mental illnesses. The Association is

comprised of more than seventeen thousand qualified Doctors of Medicine who specialize as Psychiatrists. Various aspects of Federal and State laws pertaining to the nature of the privilege and the extent of the confidentiality affording or restricting the degree and quality of privilege and confidentiality involved in the highly specialized practice of psychiatry, which differs considerably from the ordinary practice of medicine, have caused grave concern to the American Psychiatric Association and its thousands of member Psychiatrists. The practice of psychiatry transcends State lines and the privilege and confidentiality regarding Psychiatrists' records, findings and diagnoses should be covered and protected by a quality as high as that afforded to attorneys at law and clergymen. State statutes, like the California statute, which arbitrarily waive both the privilege and confidentiality, where Psychiatrists are involved in the diagnoses, treatment and care of the mentally ill on the mere filing of a civil action for damages for personal injuries, pose questions of great concern to the American Psychiatric Association and its thousands of Psychiatric members. These members practice nationwide and their practices are not restricted to any given State in the treatment of mentally ill patients.

Underlying the treatment given by a Psychiatrist to a mentally ill patient is the expressed or inferred binding understanding and agreement that the highly personal disclosures freely made by the patient and necessary to appropriate psychiatric diagnoses and treatment, are to be held in the utmost confidence and are not to be divulged. To permit this confidence to be breached on the mere basis of the filing of a civil action would decrease the capabilities of Psychiatrists to make accurate diagnoses and to provide for adequate and proper medical psychiatric treatments. Involved also in this confidential situation is the problem inherent in psychiatry which arises when the patient makes such disclosures to a Psychiatrist in good faith, with the belief, understanding or agreement that they will be kept confidential but are later compelled to be divulged, by force

of statute alone by testimony of the Psychiatrist. The problem, in effect, is unreasonable and results in compelling a patient to testify against himself without prior knowledge of the problems and dangers involved in his free disclosures made during treatment to his Psychiatrist in "inviolate" confidence.

Treatment of the mentally ill is too important (the assurance of confidentiality is central to this treatment) to risk jeopardizing the whole theory and success of treatment because of the possible but questioned relevance of some of the patient's personal statements in a later civil proceeding. Also involved, as opposition to legal compulsion, are the deep-rooted ethics of the profession as they apply to the Psychiatrist, if he is forced to breach the basic and inviolate confidentiality existing between the psychiatrist and his patient by a court order. Under "legal" compulsion he may find himself acting contrary to his ethics and his Hippocratic Oath[1] which could subject him to severe criticism by his peer group or by the community. Undue and unnecessary publicity usually follows personal disclosures of a patient. Such publicity tends to undermine public confidence in the Psychiatrist and jeopardizes the treatment value of the Psychiatrist. The possibilities of opening fantasy projections and endogenous hostility or aggression to individuals or to the public could cause serious misinterpretations of the personality, ego drives and behavior of individuals who could be normal. Such automatic forced disclosures with the resulting situations which arise therefrom could cause many persons who would otherwise seek needed psychiatric help for emotional problems to be reluctant to seek this needed learned professional medical assistance. Other serious and grave problems are involved in the

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[1] The Hippocratic Oath, which is still administered to medical graduates, states: ". . . Whatever, in connection with my professional practice or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret . . ."

type of waiver provided by the California statute which adversely affect the American Psychiatric Association and its thousands of practicing psychiatric members and the public, i.e., their patients.

QUESTIONS OF LAW INVOLVED

Serious constitutional problems are involved in the actions taken by the courts below in denying any relief and in dismissing Petitioner's actions, which attacked the California statute, all without opinions, and without the taking of any evidence. Grave questions reaching constitutional levels arise from the enforcement of the automatic waiver provisions of the California statute, requiring the Psychiatrist, on the mere filing of a civil action, to reveal the most intimate confidential disclosures made to him by his mentally or emotionally disturbed patient, contrary to the phychiatrist's practice, deeply imbedded ethics, his Hippocratic Oath and the public interests.

Petitioner points out (Pet. p. 9) that the California Law Review Commission in developing precise evidential provisions for the California Code, recommended that privilege for psychiatrists, particularly those engaged in psycotheraphy, because their treatment requires the fullest revelation of the most intimate and embarrassing details of the patient's life, should have a much broader privilege that that involved in the ordinary physician-patient privilege. In recommending that legislation should keep such confidential information "in utmost confidence," the Commission concluded (Pet. p. 9):

> "A broad privilege should apply to both psychiatrists and certified psychologists. Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Research on mental or emotional problems requires similar disclosure. Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclo-

sure upon which diagnosis and treatment or complete and accurate research depends.

The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article establishes a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. *Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.*" (Emphasis supplied).

However, the California legislature in its code of evidence enacted automatic waiver provisions which completely disregard the interests of society in the preservation of the confidence existing between psychiatrists and patients.

The statute in question provides for automatic waiver of privilege when a patient sues for damages involving mental or emotional conditions (Secs. 996 and 1016, Appendix pp. 11, 12).

These automatic provisions disregard the public interest as no hearing is authorized, no testimony is to be taken and no order is to be entered by a court of competent jurisdiction weighing the public interest against the production of "relevant information" which in effect is an unreasonable search and seizure and the compelling of the patient to be a witness against himself.

In *Boyd v. United States,* 116 U.S. 16, 6 S.Ct. Rep. 524 (1886), an evidentiary statute of the United States (Sec. 5 of the Act of June 22, 1874, 18 Stat. 187), provided when any claimant sought to recover forfeited goods held by the

United States for alleged violations of law, that the United States could serve a Motion on the claimant for the production of any books, invoices or papers relating to the allegations of the claimant and that such papers when produced by order of the court could be offered in evidence on behalf of the United States. The scheme of this Federal statute is quite similar to the scheme of the California statute and related only to non-criminal suits and proceedings.

In *Boyd* an order was issued relating to an invoice concerning the property involved, which invoice was produced and placed in evidence by the United States. The judgment in favor of the United States in *Boyd* was reversed because the Act violated the constitutional provisions of the Fourth and Fifth Amendments.

The Court stated the principal question in *Boyd* to be as follows:

> "Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him * * *."

In answering this question, after a review of the decisions the Supreme Court held in a civil case which had commenced as proceedings in rem for a forfeiture of personal property, in which the claimant filed a claim for the goods being forfeited, that the provisions for compulsory production of the claimant's papers violated the Fourth and Fifth Amendments of the Constitution and said (p. 536):

> "We find nothing in the decisions to change our views in relation to the principal question at issue. We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void, and that the inspection by the district attorney of said invoice, when produced in obedience to said notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings."

The inapt provisions of the California statute, not even requiring a court order, are unconstitutional, in that they destroy the public interest in the privilege and confidence necessary to the practice of psychiatry in the treatment of the patient.

The privilege and confidence involved in psychiatry should be held to be on a par and equal to that involved in law and and theology. We post the question of whether a statute requiring lawyers and confessional priests particularly to reveal confidences of clients and parishioners where civil actions are filed and without more, could withstand constitutional attacks. We doubt it. We state that a similar question is present here adversely involving the only other *learned* profession, the practice of medicine, the American Psychiatric Association and its thousands of member psychiatrists and the interested public, that is, the thousands upon thousands of mentally ill and emotionally disturbed patients whom the Psychiatrists treat now in strict and inviolate confidence.

The arguments presented by Petitioner herein are inadequate. While they speak for the Petitioner and his patients they do not speak effectively for the American Psychiatric Association and the more than seventeen thousand member Psychiatrists whose unique and highly specialized practices and their patients' treatment are involved in the application of the arbitrary waiver provisions of the California statute. The Applicant seeks leave to expand the present arguments made by the Petitioner in order that this Court might have a more complete presentation and understanding of the grave and important constitutional questions and problems arising under the California waiver statute involving psychiatry as a whole. If the arguments which will be presented more in detail concerning the mental health field in the applicant's Amicus Curiae Brief are approved by this Court

then the judgment of the court below should be reversed in the public interest.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 1395

JOSEPH E. LIFSCHUTZ, M.D., *Petitioner,*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN MATEO, *Respondent.*

MOTION OF CALIFORNIA STATE PSYCHOLOGICAL ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER AND BRIEF AMICUS CURIAE

The California State Psychological Association (hereinafter called the "Association") respectfully moves for leave to file a brief *amicus curiae* in the instant case in support of the petitioner's request for a Writ of Certiorari to the Supreme Court of the State of California, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for

the petitioner has been obtained. Counsel for the Arabians, the real parties in interest, has refused his consent.

INTEREST OF THE ASSOCIATION

The Association is a professional organization of psychologists in the State of California, and is part of the American Psychological Association. Approximately two-thirds of its 1,400 members are licensed under the laws of the State of California to engage in the practice of psychology. The Association is the largest organization representing licensed psychologists in California.

The practice of psychology by licensed psychologists under California law (Business and Professions Code, Sec. 2903) includes psychotherapy. "Psychotherapist," to whom the psychotherapist-patient evidentiary privilege applies, is defined in the California Evidence Code (Sec. 1010) as applying to (a) psychiatrists, and (b) licensed psychologists. The subject matter of the instant case, a psychotherapist's privilege to refuse to testify about his patient, deeply concerns, therefore, licensed psychologists who practice psychotherapy in California.

REASON FOR FILING A BRIEF AMICUS CURIAE

The Association wishes the Court to recognize that the issue here presented is not the narrow complaint of one solitary practitioner. Licensed psychologists,

for whom the Association speaks, stand in the same position as petitioner in respect to the psychotherapist's evidentiary privilege. They, too, face the danger of contempt proceedings for refusing to testify if they adhere to the standards of total confidentiality deemed necessary to the psychotherapeutic process.

If the interpretation of the California Evidence Code in petitioner's case is sustained, it will have a seriously deleterious effect on the practice of psychology. Unless this Court grants the petitioner's Writ and considers the merits of petitioner's position, there will be no opportunity to develop for the Court the reasons for this Association's position.

PSYCHOTHERAPY REQUIRES THAT THE EVIDENTIARY PRIVILEGE NOT TO TESTIFY HAVE NO EXCEPTIONS

In order effectively to practice psychotherapy, the psychotherapist must be able to assure his patient that, with no exceptions, the inner secret thoughts and ideas revealed by the patient to the psychotherapist will be confidential. The psychotherapist must urge his patient to reveal, with no reservations, the content of his thoughts as a necessary part of the treatment process. This is the core, the necessary essence, of the psychotherapeutic technique.

Without the assurances of confidentiality, the flow of inner thoughts and material will dry up, and the practice of psychotherapy will not be possible. The existing California Evidence Code denies the privilege of confidentiality to a psychotherapist if his patient

has put in issue his mental and emotional condition (California Evidence Code, Sec. 1016). This law, if applied, requires that the psychotherapist warn his patient about a potential exception to the confidentiality to which he would otherwise adhere. The effect of this would be to deny to the psychotherapist the access to the material necessary to treat his patient.

The California Evidence Code, Section 1016, as applied, violates the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States as interpreted by this Court in *Griswold v. Connecticut,* 381 U.S. 479 (1965). If the impact of the California statute on the practice of psychotherapy could be shown to this Court as requested by the petitioner, the serious limits placed by the California statute on the Constitutional rights of licensed psychologists would be revealed.

CONCLUSION

For the reasons set forth above, the Association prays that the Court grant to the petitioner the relief requested.

Dated, San Francisco, California;
June 3, 1969.

Respectfully submitted,
IRWIN LEFF,
Attorney for California State Psychological Association, Amicus Curiae.

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In the Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 116

JOSEPH E. LIFSCHUTZ, M. D.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN MATEO,
Respondent,

MOTION OF NATIONAL ASSOCIATION FOR MENTAL HEALTH FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE

The National Association for Mental Health (hereinafter denoted as NAMH) moves for leave to file a brief amicus curiae in this case in support of the petitioner's request for a writ of certiorari.

Counsel for petitioner has consented to the filing of such brief, but counsel for John Arabian, George J. Arabian and Isabelle H. Arabian, the real parties in interest, has refused his consent.

In the Supreme Court
of the
United States

October Term, 1968

No. 1395

JOSEPH E. LIFSCHUTZ, M. D.,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SAN MATEO,
Respondent,

MOTION OF NATIONAL ASSOCIATION FOR MENTAL HEALTH FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE / AND BRIEF AMICUS CURIAE

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INTEREST OF THE ASSOCIATION

NAMH is a nonprofit corporation, representing citizens throughout the United States working to improve care and treatment of the mentally ill and to promote mental health.

The issue in this case, whether a psychotherapist has a constitutional privilege to refuse to divulge confidences of his patients, is of concern not only for therapists, such as the petitioner, but equally so for patients and therefore also for all those interested in the welfare of the mentally ill, including the members of NAMH, its state divisions and its local chapters.

REASON FOR FILING A BRIEF AMICUS CURIAE

The petitioner's contention is that for a state to compel him to disclose confidences of a patient impairs his ability to practice his profession and thus violates his rights under the United States Constitution. But any impairment of the therapist's ability to treat patients impairs the interests of the patients at least as much as those of the therapist. Indeed, it seems correct to say that the reason why the petitioner and others in his profession should be held to have a constitutional right to practice their profession without unreasonable restraints is that such practice serves a vital public interest by ministering to the needs of mentally ill patients. The NAMH asks leave to supplement the petitioner's arguments by emphasizing the interest in the issue presented, and the constitutional rights, of patients and potential patients – which in effect means every person in the United States.

A STATE MAY NOT CONSTITUTIONALLY COMPEL BREACH OF CONFIDENTIALITY OF COMMUNICATIONS BETWEEN A PSYCHIATRIC PATIENT AND HIS THERAPIST

The rights of patients are properly before the court. In this case, as in *Griswold v. Connecticut*, 381 U. S. 479 (1965),

the petitioner has standing to raise the constitutional rights of the persons with whom he has a professional relationship.

That what a physician is told by his patient in confidence is to be kept confidential has been an accepted precept of medical ethics at least since the time of Hippocrates. The assurance of confidentiality is particularly important in the treatment of mental illness. The psychiatrist must insist on very personal data, and must explore the relationship of the patient's acts to his basic drives, which can only be adequately revealed by his deepest and most secret thoughts and feelings. This is ture not only in psychoanalysis but in all psychotherapy.

A person seeking such therapy may confess to marital infidelities, perverse sexual behavior or other conduct which might incriminate him in criminal or other litigation. He would be hesitant to speak frankly to his therapist about such matters if he knew the latter could later be compelled to reveal them in open court and he might feel constrained from exercising his right to consult a physician if he knew that to do so might entail such revelation.

"What is more, the patient's statements may reveal to his therapist much more than the patient intends or realizes. The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what is expected of them, and that they cannot get help except on that condition. It is extremely hard for them to bring themselves to the point where they are willing to expose the dark recesses of their mind to the psychiatrist . . . . It would be too much to expect them to do so if they knew that all they say – and all that the psychiatrist learns from what they say – may be revealed to the whole world from a witness stand." Guttmacher and Weihofen, Psychiatry and the Law 272 (1952).

For a state to compel such revelation therefore seriously obstructs access of all mentally ill persons to therapy, and thus interferes with their constitutional right to consult a physician and to seek treatment. This interference constitutes a deprivation of due process of law, in that it invades the freedom of speech and the rights of privacy guaranteed by the First,

Fourth and Fifth Amendments, and applicable against the states through the Fourteenth.

"A state may not," as this Court has said, "consistently with the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut,* 381 U. S. 479, 482. Freedom of speech includes the right to receive information as well as to impart it – "indeed the freedom of the entire university community." Id. The right to receive professional medical advice and therapy is surely as essential a part of this freedom as the right to study a foreign language, *Meyer v. Nebraska,* 313 U. S. 236, or the right to educate oneself or one's children as one chooses. *Pierce v. Society of Sisters,* 268 U. S. 510.

The Fifth Amendment in its self-incrimination clause "enables a citizen to create a zone of privacy which government may not force him to surrender to his detriment." And the Fifth together with the Fourth Amendment protects against all governmental invasions "of the sanctity of a man's home and the privacies of life." *Griswold v. Connecticut, supra.* Whatever may be the proper limits of the concept of a "right of privacy," it must include, if it means anything, the inviolability of confidences about abnormal and anti-social behavior and bizarre and unacceptable thoughts and feelings that people are unwilling to expose except in the privacy of the psychotherapeutic relationship.

THE CALIFORNIA STATUTES RESTRICTING RECOGNITION OF THE PRIVILEGE ARE OVERBROAD

California recognizes a legal privilege to prevent the revealing in court of information communicated by patients to their therapists in confidence. The NAMH does not contend that this privilege may not be reasonably limited. Indeed, it is recognized that authorities on the law of evidence have been critical of the privilege and some have urged its abolition. But the objections have been leveled at abuses in non-psychiatric cases – personal injury suits, for example. A person who has been struck by an automobile is not likely to have any legiti-

mate interest in keeping the extent of his injuries secret. On the contrary, he is usually eager to round up as many witnesses as he can to testify to what happened and to the extent of his injuries. If he objects to the testimony of a doctor who treated him, it is not because he wants to keep his injuries secret, but almost certainly because he fears the doctor will testify that he was not appreciably injured at all.

But mental injury or ill health is still a matter of which many people are ashamed and which they want to hide. Although there may be no reason to suppose that the automobile accident plaintiff intends his consultation with a doctor to be confidential, there is every reason to assume that the psychiatric patient so intends.

California may properly restrict the privilege so as to curb abuses shown to exist. But the California statutes undertake to restrict the privilege in a relationship where it is essential to treatment, where its restriction impairs constitutional rights and where no abuses have been shown.

In particular, the provision of the California statute that the privilege is waived if a person, at any time after treatment, puts his medical and emotional condition in issue in a law suit, Cal. Evidence Code Secs. 996(a), 1016(a), operates to constrain persons from seeking psychiatric care and treatment. As said, a person seeking such care and treatment must accept the requirement that he be completely frank in his "free association" verbal production. He is not likely to feel so free unless the therapist can assure him of absolute confidentiality, especially because the patient cannot know at the outset what fears and fantasies he may reveal as treatment progresses, perhaps because some of these are so buried in his unconscious that he does not himself know that they exist. And since, as already said, he does not know what his verbal productions may reveal to the therapist over and beyond what his words express, it is unrealistic to say that if, perhaps years later, he puts his mental condition in issue in some case at law, he thereby waives his privilege and consents to the therapist's disclosing all that he had said and all that his words revealed about him. All patients as a class, and all persons who may contemplate consulting a therapist for mental illness or emotional disturbance, will to some extent be intimidated and

deterred by the spectacle of therapists being haled into court and compelled in a public trail to reveal confidences of patients, and by the realization that anything they tell a therapist may similarly be exposed if at any time in the future they do any act, whether intentionally, inadvertently, or by neurotic impulse, that the law deems to constitute a waiver.

CONCLUSION

The California statutory provision that putting one's mental or emotional condition at issue in a law suit automatically constitutes a waiver of the privileged status of communications confided to one's psychotherapist, no matter how long in the past, operates to intimidate and deter persons from exercising their constitutional right to consult a therapist and to obtain care and treatment for mental illness. Whether a state may thus impair this vital personal right has never been decided by this Court. NAMH therefore respectfully urges that the Writ of Certiorari issue.

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